

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 25, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2711-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF STURGEON BAY,

Plaintiff-Appellant,

v.

ERIC A. FRIEHE,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Reversed.*

MYSE, J. The City of Sturgeon Bay appeals a judgment dismissing a civil forfeiture action charging Eric Friehe with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol content.¹ The City contends that the trial court erred by failing to direct a guilty verdict and that there is insufficient evidence to support the jury's conclusion that Friehe was not guilty of the charged ordinance violation. Friehe argues that the trial court erred by finding the bank parking lot in which he was arrested to be open to the public. Because the uncontested facts show the City was entitled to a directed verdict of guilty and the bank parking lot was open to the public, the judgment is reversed.

¹ This is an expedited appeal under RULE 809.17, STATS.

The facts are undisputed. Friehe was a patron of the Maritime Bar in Sturgeon Bay. He became intoxicated and went to his car that was parked in the Bay Lake Bank's parking lot located next to the Maritime Bar. Friehe admits he was intoxicated and blood tests subsequently conducted confirm that his blood alcohol level was beyond the permissible limit established by statute for operating a motor vehicle. Friehe entered the vehicle, placed the key in the ignition, started the car and turned the headlights on. He then climbed over the center console into the passenger seat and went to sleep. Friehe contends he was awaiting the designated driver's arrival at the car so that the driver could take him home.

The Bay Lake Bank parking lot contained a sign that prohibited parking after hours. A bank employee testified that cars parked after bank hours were subject to being towed away and in fact some vehicles that had been parked in the parking lot after hours had been towed. On the night in question, a bank employee observed Friehe's car running with its headlights on and informed the police. When the police investigated they found Friehe asleep in the vehicle. After determining Friehe was intoxicated, the officer issued a citation for operating a motor vehicle while intoxicated and for operating a motor vehicle with a blood alcohol level in excess of .10. After Friehe was arrested, he was escorted to Door County Memorial Hospital where a blood test confirmed his intoxication. Friehe stipulates that at the time in question he was intoxicated.

The City contends that the trial court erred by refusing to direct a verdict of guilty based upon the uncontroverted evidence that Friehe was intoxicated and had started the engine of the motor vehicle. This case requires the application of a statute to undisputed facts, a question of law which this court determines without deference to the trial court's determination. *State v. Keith*, 175 Wis.2d 75, 78, 498 N.W.2d 865, 866 (Ct. App. 1993).

The City of Sturgeon Bay ordinance Friehe is charged with violating is an adoption of § 346.63, STATS., which provides that "[n]o person may drive or operate a motor vehicle" with a prohibited blood alcohol content. What constitutes operation of a motor vehicle as that term is used by the statute has been well settled by Wisconsin law. The operation of a motor vehicle is described as the "physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Section 346.63(3)(b), STATS. In *County of Milwaukee v. Proegler*, 95 Wis.2d 614, 618-19, 291 N.W.2d 608, 609-10 (Ct. App. 1980), the court dealt with an individual who did nothing more than start the engine of a motor vehicle. The court there concluded that the starting of a vehicle's engine was sufficient to constitute operation of the vehicle as that term is used in the statute. *Id.* at 627-28, 291 N.W.2d at 614. Because the starting of a motor vehicle itself constitutes operation, Friehe's intent not to move the vehicle is irrelevant.

The principle that the starting of a motor vehicle engine is sufficient to constitute operation has been applied in a variety of cases. *Id.*; *Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985). This well-established principle is controlling of the issue raised by the City and requires that we conclude the trial court erred by refusing to grant the City's motion for a directed verdict. There are only two elements of the offense charged: that Friehe was intoxicated and that he operated a motor vehicle. His intoxication was stipulated and the turning on the vehicle is sufficient to constitute the operation of the motor vehicle under the laws of Wisconsin. Accordingly, there is no issue for the jury to determine, and the court erred by failing to grant the City's motion for a directed verdict.

Friehe contends, however, that the bank's parking lot was not a public highway or private property held open to public use and, accordingly, is not a place to which the statutory prohibition applies. The trial court concluded as a matter of law that the bank parking lot was private property held out for public use and refused to submit this issue to the jury. Friehe contends the trial court erred and that this court should affirm the judgment of dismissal based upon the City's failure to demonstrate the bank parking lot was property to which the statute applied. The bank had erected a sign that prohibited after hours parking and had instructed its employees to investigate and tow vehicles parked in the parking lot after the bank's business hours. Access to the parking lot was unobstructed at all times, and the lot was used by persons making night deposits after business hours as well as persons simply turning around in the parking lot.

Whether a parking lot constitutes private property held out for public use was addressed in *Kenosha v. Phillips*, 142 Wis.2d 549, 419 N.W.2d 236 (1988). Our supreme court held that the determination whether a parking lot is held out for public use as defined by the statute is a factual determination to be made by the trier of fact. In *Phillips*, the supreme court stated that the test to determine whether property was held out to the public was whether the person in charge of the premises allows "the public as a whole to make use of the premises for their motor vehicles." *Id.* at 558, 419 N.W.2d at 239. This test was later refined to "whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." *La Crosse v. Richling*, 178 Wis.2d 856, 860, 505 N.W.2d 448, 449 (Ct. App. 1993).

In this case, the only restriction on the bank's parking lot was a prohibition against after hours parking. The lot, however, was open to its customers making night deposits and open to the public in general in using the parking lot as a place to turn around. These authorized uses of the bank's parking lot demonstrate that the parking lot was open to

the "public as a whole" for a use allowed by the owner. Any of the bank's customers from the public in general could be using the parking lot after business hours for night deposits. Although the bank prohibited parking after hours, this prohibition does not close the parking lot to the public. The public was free to operate in the parking lot for the purpose of making night deposits and turnarounds. As a result, the use of the parking lot was not limited to a "defined, limited portion of the citizenry." *Phillips*, 142 Wis.2d at 557, 419 N.W.2d at 239. Because the City was entitled to a direct verdict and the bank parking lot was open to the public under section 346.63, STATS., the judgment is reversed.

By the Court.—Judgment reversed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.